Supreme Court, U.S.
FILED
SEP 12. 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-277

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

SEAWINDS, LIMITED,
Petitioner,

VS.

NEDLLOYD LINES, B.V., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

M. LAURENCE POPOFSKY
Counsel of Record
PETER A. WALD
HELLER, EHRMAN, WHITE & MCAULIFFE
333 Bush Street
San Francisco, CA 94104
Telephone: (415) 772-6000

Attorneys for Respondent, Nedlloyd Lines B.V., Royal Nedlloyd Group N.V., and KNSM Lines B.V.

(List of counsel continued on inside cover)

ROWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

CHARLES S. DONOVAN
WALSH, DONOVAN, LINDH & KEECH
595 Market Street, Suite 2000
San Francisco, CA 94105
Telephone: (415) 957-8700
Attorneys for Nedlloyd Lines B.V., Royal Nedlloyd Group N.V., and KNSM Lines B.V.

WILLIAM I. EDLUND
WALTER R. ALLAN
JOHN F. MCLEAN
PILLSBURY, MADISON & SUTRO
225 Bush Street
San Francisco, CA 94104
Telephone: (415) 983-1000
Attorneys for American President Companies, Ltd. and American President Lines, Ltd.

ROBERT S. ZUCKERMAN
SEA-LAND CORPORATION
10 Parsonage Road
Edison, New Jersey 08818
Telephone: (201) 632-2222

TERRY M. GORDON
LASKY, HAAS, COHLER & MUNTER
Professional Corporation
505 Sansome Street,
Suite 1200
San Francisco, CA 94111
Telephone: (415) 788-2700
Attorneys for Sea-Land Corporation and Sea-Land Service, Inc.

STANLEY O. SHER
MARC J. FINK
KELLY A. KNIGHT
DOW, LOHNES & ALBERTSON
1255 Twenty-Third Street, N.W.
Suite 500
Washington, D.C. 20037
Telephone: (202) 857-2500

GARY S. ANDERSON
FARELLA, BRAUN & MARTEL
235 Montgomery Street,
30th Floor
San Francisco, CA 94104
Telephone: (415) 954-4400
Attorneys for Dampskibsselskabet AF 1912 A/S, A/S Dampskibsselskabet Svenborg, A.P. Moller-Maersk Line, and Hapag-Lloyd Aktiengesellschaft

NATHAN LANE III
RALPH M. PAIS
JAMES N. NEBEL
GRAHAM & JAMES
One Maritime Plaza, Suite 300
San Francisco, CA 94111
Telephone: (415) 954-0200
Attorneys for Incotrans B.V., Rotterdam, The Netherlands (formerly Intercontinental Transport (ICT) B.V.)

QUESTION PRESENTED

Is petitioner's international maritime antitrust claim governed by the Shipping Act of 1984 (46 U.S.C. §§ 1701-1720), by which Congress eliminated the jurisdiction of district courts to hear private maritime antitrust actions and required claimants to proceed exclusively before the Federal Maritime Commission for compensation, or does section 108(a) of the Bankruptcy Code (11 U.S.C. § 108(a)) extend not only the Shipping Act's specific statute of limitations (46 U.S.C. § 1710(g)) but also its general one-year savings clause (46 U.S.C. § 1719(e)(2)(B)), thereby exempting petitioner's claim from the Shipping Act?

LIST OF PARTIES

Respondents herein are: Nedlloyd Lines, B.V.; Royal Nedlloyd Group, N.V.; KNSM Lines, B.V.; American President Companies, Ltd.; American President Lines, Ltd.; Sea-Land Corporation; Sea-Land Service, Inc.; Dampskibsselskabet AF 1912 A/S; A/S Dampskibsselskabet Svendborg; A.P. Moller-Maersk Line; Hapag-Lloyd Aktiengesselschaft; and Incotrans B.V., Rotterdam, The Netherlands (formerly Intercontinental Transport (ICT), B.V.).[1]

---

[1] The listing required by Rule 28.1 appears as the appendix to this brief, at pp. A1-A3.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Statement of the Case	1
A. The statutory framework	1
B. The proceedings below	2
Reasons for Denying the Writ	3
I. There Is No Conflict of Decision, and No Important Question Is Presented	3
II. In Any Event, the Decision Below Is Correct	4
A. Section 108(a) does not extend the Shipping Act's one-year savings period for the application of prior law	4
B. In addition, Seawinds' antitrust claim on its face is based on post-Shipping Act conduct; any action based upon such conduct must be brought before the FMC	5
Conclusion	7

TABLE OF AUTHORITIES CITED

Cases

	Page
Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, (1981)	6
Matter of Lauderdale Motor Car Corp., 35 B.R. 544, (Bankr.S.D.Fla. 1983)	5
Treadaway v. Academy of Motion Picture Arts, 783 F.2d 1418, (9th Cir. 1986)	6

Statutes

11 U.S.C. § 108(a)	i, 2, 3, 4, 5
46 U.S.C.:	
§§ 1701-1720	i
§ 1706(c)(2)	1
§ 1709	2
§ 1710(a)(g)	1
§ 1710(g)	i, 1
§ 1719(e)(2)(B)	i, 1

Other Authorities

H.R.Rep. No. 595, 95th Cong., 1st Sess. 318, reprinted in 1978 U.S.C. Cong. & Ad. News 5963, 6275	5

No. 88-277

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

SEAWINDS, LIMITED,
Petitioner,

VS.

NEDLLOYD LINES, B.V., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. The statutory framework

As petitioner Seawinds, Limited, ("Seawinds") acknowledges (Pet., pp. 3-4), the Shipping Act of 1984 removed jurisdiction from the federal courts to hear private treble damage antitrust claims for activities in international maritime commerce prohibited by the Act (46 U.S.C. § 1706(c)(2)). Instead, such claims must be brought before the Federal Maritime Commission ("FMC"), which is authorized to award full (and sometimes double) compensation for all injuries incurred from conduct prohibited by the Act (46 U.S.C. § 1710(a)(g)). This proscription was subject to a narrow exception contained in a "savings clause" that preserved district court jurisdiction for pending antitrust actions and for antitrust actions brought with respect to conduct engaged in before March 20, 1984, if filed within one year from that date (46 U.S.C. § 1719(e)(2)(B)). The Shipping Act also contains a general three-year statute of limitations for claims covered by the Act (46 U.S.C. § 1710(g)).

Seawinds' petition calls into question application of section 108(a) of the Bankruptcy Code (11 U.S.C. § 108(a)) to the Shipping Act's savings clause—not its separate statute of limitations. Under section 108(a), a law that "fixes a period within which the debtor may commence an action" is extended until two years after the granting of a bankruptcy petition for relief.

B. The proceedings below

Seawinds' complaint alleged that respondents had conspired "to drive Seawinds out of [the international maritime shipping] business" in violation of sections 1 and 2 of the Sherman Act and that respondents were also liable to Seawinds on various pendent common law claims (C.R. 1, 9:25-27, 17:19-24:20). The alleged conduct is expressly prohibited by the Shipping Act (46 U.S.C. § 1709).[2]

On respondents' motion to dismiss for lack of subject matter jurisdiction, Seawinds contended that section 108(a) of the Bankruptcy Code applied not only to the Shipping Act's statute of limitations, but also to the Act's one-year savings clause, and that therefore its action was timely filed. The district court noted that section 108(a) has consistently been held "to toll statutes of limitations in appropriate circumstances," thus furthering "the bankruptcy policy of preserving assets of the estate, including a debtor's causes of action" (Pet., p. B12, n. 6, p. B14). The district court held, however, that it was the clear intent of Congress "to divest the courts of jurisdiction over federal maritime antitrust actions filed after the one-year period specified in [the savings clause]" (Pet., pp. B14-B15). Accordingly, section 108(a) could not be applied to contravene Congress' express removal of juris-

---

[2] The specific overt acts in the pendent claims were alleged to have continued "at least until November 1984" (C.R. 1, 21:1-23:26). However, in a transparent attempt to avoid the jurisdictional mandate of the Shipping Act, Seawinds alleged that the antitrust conspiracy—which rested upon specific overt conduct identified in the pendent claims as occurring well beyond March 20, 1984—ceased on March 15, 1984, five days before the effective date of the Shipping Act (see discussion, *infra*, pp. 5-6).

diction from the district courts (ibid.). The Court of Appeals for the Ninth Circuit affirmed (Pet., pp. A1-A2).

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT OF DECISION, AND NO IMPORTANT QUESTION IS PRESENTED

Seawinds concedes that the district court's decision presents no conflict with any other decision, but it seeks to engage this Court's attention by asserting that the decision has "broad implications" and "far-reaching consequences" (Pet., pp. 3, 7). Seawinds' assessment of the importance of this case has no basis in fact. The particular question presented—namely, whether section 108(a) of the Bankruptcy Code should be applied to the savings clause of the Shipping Act—appears to be sui generis. The applicable time period has long since expired, and we are not aware of any other case in which the issue has arisen or could arise.

Seawinds does not assert otherwise.[3] Rather, Seawinds argues that the district court's decision may establish a precedent under which parties generally "will no longer be able to rely on Section 108(a) to protect the bankruptcy estate" (Pet., p. 12). This is patent nonsense. The decision below does not affect section 108(a)'s extension of applicable statutes of limitations (see Appx. B to Pet., at pp. B11-B12, and authorities cited therein). The district court's decision could be precedent *only* in the context of legislation containing a savings clause (which, by its nature, would be operative for a very limited period of time), such as that included in the Shipping Act, and a bankruptcy filing that brings into play section 108(a). Again, Seawinds points to no such situation, and we are aware of none.

Equally important, Seawinds' premise—that a bankruptcy estate might lose a valuable asset—is false. As Seawinds admits (Pet., p. 4), full reparations may be sought under the Shipping

---

[3] Indeed, in the proceedings below, Seawinds acknowledged that the number of similar cases, if any, is "very small" and that the effect of any decision therefore would be "very, very, very limited" (RT 11/5/86, p. 22:2-3, 6-7).

Act. The Act simply changed the forum and, as a policy choice, eliminated the automatic treble damage penalties (while allowing some double damages). It did *not* eliminate the right of a debtor in bankruptcy to be made whole.

Hence, contrary to Seawinds' dire predictions, the decision below creates no uncertainty and will have no adverse effect on bankruptcy estates. Seawinds in fact refers to no statutory scheme under which any adverse effect might occur; its claims are thus entirely hypothetical. The prophesied "flood of costly and unmeritorious lawsuits" (Pet., p. 12) will not occur. Seawinds' labored attempt to create an important issue worthy of this Court's review utterly fails.

II. IN ANY EVENT, THE DECISION BELOW IS CORRECT

A. Section 108(a) does not extend the Shipping Act's one-year savings period for the application of prior law

Congress' fundamental purpose in enacting the 1984 Shipping Act was to consolidate the regulation of international ocean transportation in the FMC. This vesting of exclusive jurisdiction in the FMC reflected two policy judgments. First, Congress wished to alleviate the strain on international relations occasioned by courts' application of antitrust laws to international ocean commerce; second, Congress elected to eliminate the uncertainty generated by the dual jurisdiction exercised by the FMC and the district courts in such commerce (see authorities cited at Pet. Appx. B, pp. B5-B6). The FMC was chosen as the exclusive arbiter of international competition within the United States maritime shipping industry because it has particular expertise in maritime matters and can speak with a single, consistent voice (ibid.).

The policy underlying section 108(a) of the Bankruptcy Act is equally clear. In order to facilitate compensation to bankruptcy estates, that provision grants debtors and their trustees additional time within which to commence proceedings to recover monies owed the estate without fear that those claims will be time-barred; "[s]ubsection (a) extends any statute of limitation for commencing or continuing an action by the debtor" (H.R.Rep.

No. 595, 95th Cong., 1st Sess. 318, reprinted in 1978 U.S.C. Cong. & Ad. News 5963, 6275). Thus, Congress' concern was directed at statutes that would *eliminate* claims belonging to the estate:

> "Section 108(a) extends statutes of limitation on causes of actions which might otherwise expire after the commencement of a bankruptcy case." *Matter of Lauderdale Motor Car Corp.*, 35 B.R. 544, 549 (Bankr.S.D.Fla. 1983).

The district court's decision gives full effect to the policies underlying both section 108(a) and the Shipping Act. Because the bankrupt estate can be *compensated and made whole* in proceedings before the FMC, the policies underlying the bankruptcy laws will be served by honoring Congress' intent to remit international maritime claims to the FMC. Indeed, a bankrupt estate will obtain the benefit of section 108(a) by its application to the Shipping Act's statute of limitations in FMC proceedings. However, allowing Seawinds to proceed in the district court—against, inter alia, several foreign shipping companies—would frustrate the intent of Congress in vesting exclusive jurisdiction in the FMC.

Seawinds bases its argument to the contrary on cases that hold section 108(a) applicable to both "substantive" and "procedural" statutes of limitations (see Pet., pp. 7, 9-10). Those decisions are in accord with Congress' intent to extend all statutes that would cause actions to be time-barred. However, they are irrelevant to consideration of the savings clause here, which serves the manifestly different purpose of providing for an orderly transfer of jurisdiction between the district court and the FMC to adjudicate international maritime claims.

B. In addition, Seawinds' antitrust claim on its face is based on post-Shipping Act conduct; any action based upon such conduct must be brought before the FMC

It is undisputed that Seawinds was required to proceed before the FMC if its action was based upon alleged misconduct occurring *after* March 20, 1984. Review of Seawinds' complaint dem-

onstrates conclusively that Seawinds' antitrust claim involves numerous such purported acts.[4]

Seawinds argued below that, despite its specific allegations of precise dates of particular overt acts, it could avoid the jurisdiction of the FMC simply by inclusion of a general, conclusory allegation that the purported antitrust conspiracy came to an abrupt halt on March 15, 1984, five days before the Shipping Act's effective date. However, a party cannot, by such artful pleading, avoid jurisdictional mandates. *Treadaway v. Academy of Motion Picture Arts*, 783 F.2d 1418, 1421, n. 3 (9th Cir. 1986); see *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397, n. 2 (1981). Hence, even though the district court did not pass upon this issue, its decision is also correct because Seawinds alleges antitrust misconduct occurring after the effective date of the Shipping Act.

---

[4] Although the antitrust cause of action does not allege the specific date of occurrence of any of the overt acts sued upon, Seawinds alleged that certain acts were a part of the asserted conspiracy and were also the basis for its pendent common law claims (CR 1, 9:25-28, 11:25-12:8, 12:10-21, 21:1-15, 28:23-29:3). The complaint expressly alleges that such acts occurred at various specified times after March 20, 1984 and "at least until November 1984" (C.R. 1, 21:1-23:26).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Dated: San Francisco, California, September 12, 1988.

M. LAURENCE POPOFSKY
PETER A. WALD
HELLER, EHRMAN, WHITE & MCAULIFFE

CHARLES S. DONOVAN
WALSH, DONOVAN, LINDH & KEECH
Attorneys for Nedlloyd Lines B.V., Royal Nedlloyd Group N.V., and KNSM Lines B.V.

WILLIAM I. EDLUND
WALTER R. ALLAN
JOHN F. MCLEAN
PILLSBURY, MADISON & SUTRO
Attorneys for American President Companies, Ltd. and American President Lines, Ltd.

ROBERT S. ZUCKERMAN
SEA-LAND CORPORATION

TERRY M. GORDON
LASKY, HAAS, COHLER & MUNTER
Attorneys for Sea-Land Corporation and Sea-Land Service, Inc.

STANLEY O. SHER
MARC J. FINK
KELLY A. KNIGHT
DOW, LOHNES & ALBERTSON

GARY S. ANDERSON
FARELLA, BRAUN & MARTEL
Attorneys for Dampskibsselskabet AF 1912 A/S, A/S Dampskibsselskabet Svenborg, A.P. Moller-Maersk Line, and Hapag-Lloyd Aktiengesellschaft

NATHAN LANE III
RALPH M. PAIS
JAMES N. NEBEL
GRAHAM & JAMES
Attorneys for Incotrans B.V., Rotterdam, The Netherlands (formerly Intercontinental Transport (ICT) B.V.)

APPENDIX A

Rule 28.1 Listing

The subsidiaries (other than wholly owned subsidiaries) and affiliates of Nedlloyd Lines B.V., Royal Nedlloyd Group N.W., and KNSM Lines B.V. are:

Seabridge Australia Pty. Ltd.
Seabridge (NZ) Ltd.
Seaways Leasing Company Ltd.
Astec N.V.
Tropicbird N.V.
Vuelpicado SA
Brink's-Gerlach B.V.
Paris Air Courier SA
France Air Groupage SA
Bell Transport N.V.
Envios Uegentes Mundiales SA
Blackstone Oil Company
Crescent NDL Partnership 1985
Crescent NDL Partnership 1986
Smit Internationale N.V.
Nederlandse Silo-, Elevator- en Graanfactormaatschappij N.V.
Nieuw Rotterdam Beheer N.V.
Nieuw Rotterdam Leven N.V.
Nimox N.V.
Asia Australia Express Ltd.
Nedlloyd Swire Pty. Ltd.
Orchid (Holdings) Pty. Ltd.
Australian Document Exchange Pty. Ltd.
Pacific Oriëntal Terminal Comp. (Potco)
Plataformas Y Servicios S.A.
Cliffs Neddrill Turnkey International
V.o.F.
Delta North Transportation Ltd.

The parent company of Sea-Land Corporation is CSX Corporation. The parent company of Sea-Land Service, Inc., is Sea-Land Corporation. The subsidiaries (other than wholly owned subsidiaries) and affiliates of Sea-Land Service, Inc., are:

Arabian Container Terminals, Limited
Asia Terminals Limited
Entremar, S.A.
Sea-Land Container Terminal Administration Co., Ltd.
World Feederships, Inc.

The subsidiaires (other than wholly owned subsidiaries) and affiliates of Dampskibsselkskabet AF 1912 A/S, A/S Dampskibsselkskabet Svenborg, A.P. Moller-Maersk Line, and Hapag-Lloyd Aktiengesellschaft are:

Hapag-Lloyd

UNIKAI Hafenbetrieb GmbH
(Hamburg, West Germany)
Hapag-Lloyd Reisebüro GmbH Köln
(Köln, West Germany)
Deutsche Flugzeugvermietungs AG & Co. KG
(Stapelfeld, West Germany)

Maersk

Maersk Inc.
(Madison, New Jersey)
Maersk Line (Hong Kong) Ltd.
(Causeway Bay, Hong Kong)
Maersk Line K.K.
(Tokyo, Japan)
Maersk Line (Singapore) PTE. Ltd.
(Singapore)

The parent company of Incotrans B.V., Rotterdam, The Netherlands (formerly Intercontinental Transport (ICT) B.V.) is Incotrans Holding B.V., Rotterdam, The Netherlands. Its subsidiaries (other than wholly owned subsidiaries) and affiliates are:

Subsidiares

Incotrans Germany GmbH, Düsseldorf, W. Germany
Incotrans GmbH Linien Agentur, Bremen, W. Germany
Oranje Lijn (Maatschappij Zeetransport) BV, Rotterdam, The Netherlands
Incotrans SA, Madrid, Spain
Atlantic Container Line BV, Rotterdam, The Netherlands
Atlantic Container Line Ltd., Hamilton, Bermuda
Gulf Container Line (GCL) BV, Rotterdam, The Netherlands
Cetraco NV, Antwerp, Belgium
Combined Tonnage Center GmbH, Hamburg, W. Germany
Central Equipment Management Ltd., Southampton, United Kingdom

Affiliates (affiliated via the parent company)

Incotrans Ships BV, Rotterdam, The Netherlands
Scheepvaart Maatschappij "Trans-Oceaan" BV, Rotterdam, The Netherlands
ICT Vrachtbedrijf BV, Rotterdam, The Netherlands
Translogistic BV, Rotterdam, The Netherlands
Interkade BV, Rotterdam, The Netherlands
Gedeno BV, Rotterdam, The Netherlands

American President Companies, Ltd., and American President Lines, Ltd., have no subsidiaries (other than wholly owned subsidiaries) or affiliates.